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In the Supreme Court of the United States

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

MICHAEL WAYNE HALEY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "actual innocence" exception to the procedural default rule concerning federal habeas corpus claims should apply to noncapital sentencing error.

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This case presents the Court with a well-developed, three-way circuit split on the issue whether the "actual innocence" exception to the procedural bar rule applies in the noncapital sentencing context. The Seventh, Eighth, and Tenth Circuits have held that it does not; the Second has held that it does; and the Fourth and Fifth have held that it does in cases involving the application of habitual offender statutes. This question of national importance invokes concerns of comity, finality of state court convictions, and federalism. The Court should grant the petition for writ of certiorari to address this important question of federal law and resolve the circuit split. *See* SUP. CT. R. 10(a), (c).

CITATION OF OPINIONS

The Fifth Circuit's opinion is reported at 306 F.3d 257 (CA5 2002) (*Haley I*). App.. at 1a-20a. The opinion denying the Director's petition for rehearing en banc is reported at 325 F.3d 569 (CA5 2003) (*Haley II*). App.. at 21a-29a. The district court's final judgment is unreported. App., at 30a-38a.

BASIS FOR JURISDICTION

The Fifth Circuit delivered its judgment and opinion on September 27, 2002, and denied the Director's petition for rehearing en banc on March 19, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C.A. §1254(1).

STATUTORY PROVISIONS INVOLVED

Texas Penal Code §12.42 provides in relevant part:

(a)(2) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony.

Texas Penal Code §31.03 provides in relevant part:

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

. . .

(e) Except as provided by Subsection (f), an offense under this section is:

. . .

(4) a state jail felony if:

. . .

(D) the value of the property stolen is less than $1,500 and the defendant has been previously convicted two or more times of any grade of theft.

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C.A. §2254 (AEDPA), provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On October 29, 1997, Haley was convicted of theft. *Haley I*, App., at 1a-2a. Haley's criminal act, theft of a calculator, would ordinarily have been punishable as a Class A misdemeanor, but it was enhanced to a "state jail felony" based on two prior theft convictions. *Id.*; TEX. PEN. CODE

§31.03(e)(4)(D). Additionally, based upon two other prior felony convictions for delivery of amphetamines and attempted robbery,[1] Haley was classified as a habitual felony offender, which resulted in the enhancement of his sentence to that of a second-degree felony. *Haley I*, App., at 2a; TEX. PEN. CODE §12.42(a)(2). Haley was sentenced to sixteen years imprisonment. *Haley I*, App., at 3a.

Under the Texas habitual felony offender statute, however, a defendant is not eligible for punishment enhancement merely because he has been convicted of any two prior felonies. As relevant to this case, the statute also requires that the convictions be "sequential"—that is, it requires the second previous felony conviction to be for an offense that was committed after the first previous felony conviction became final. TEX. PEN. CODE §12.42(a)(2). Accordingly, the indictment in this case alleged that Haley's first felony conviction for delivery of amphetamine had become final before the commission of his second felony of attempted robbery. *Haley I*, App., at 5a-6a, n.5. As the State has since conceded, however, this allegation was incorrect. *Id.*, at 5a. In actuality, Haley committed attempted robbery on October 12, 1991, six days before his felony conviction for delivery of

1. The panel opinion, the dissent from the petition for rehearing en banc, the district court, and the magistrate judge have identified this second felony conviction as being for "aggravated robbery." This incorrect characterization of Haley's conviction derives from Texas Department of Criminal Justice records that inaccurately reflected that charge. However, as demonstrated by the district court's nunc pro tunc judgment, Haley was convicted of attempted, not aggravated, robbery. This minor discrepancy is irrelevant to the question presented.

amphetamine became final on October 18, 1991. *Id.* Thus, there is no dispute that Haley's punishment was improperly enhanced under the statute.

Haley did not, however, object to the enhancement, at trial or on appeal. *Id.*, at 3a. On direct appeal, the state court of appeals affirmed Haley's conviction, and the Texas Court of Criminal Appeals refused Haley's petition for discretionary review. *Id.* In his state habeas petition, Haley alleged for the first time the specific complaint that his sentence had been improperly enhanced. *Id.*, at 4a. The state habeas court recommended that Haley's application be denied because this complaint, properly couched as a challenge to the sufficiency of the evidence, is not cognizable in a state post-conviction writ of habeas corpus, but can be brought only on direct appeal. *Id.*; *see also id.*, at App. 11a-12a (citing *Clark v. Texas*, 788 F.2d 309, 310 (CA5 1986)). Because Haley did not challenge the sufficiency of the evidence on direct appeal, his claim was procedurally barred. *Id.*, at App. 4a. The Texas Court of Criminal Appeals denied Haley's state habeas application based on the findings of the trial court. *Id.*

Haley timely filed his federal habeas application asserting, among other things, that there was no evidence to support the sequential nature of the enhancements as stated in the indictment. *Id.* The federal district court granted Haley's application on this ground, despite the state court's finding that it was procedurally barred. *Id.*, at App. 8a. The federal district court found that the procedural bar was excused because Haley had shown he was "actually innocent" with respect to sentencing because he lacked the timely predicate

violation for sentencing as a habitual offender under the Texas statute. *Id.*

The Fifth Circuit affirmed, holding that the "actual innocence" exception to the procedural bar doctrine applies to noncapital cases involving the application of habitual felony offender sentencing provisions. *Id.*, at App. 17a. The Director timely filed a petition for rehearing en banc. The petition was denied. However, Judge Smith, joined by Judges Jolly, Jones, Barksdale, Garza and Clement, dissented from the denial, pointing out the national importance of this issue and the well-developed circuit split. *See Haley II*, App., at 21a-29a.

SUMMARY OF THE ARGUMENT

The circuit courts are, and have been for some time, deeply divided on the question whether the "actual innocence" exception to the procedural bar rule applies in noncapital sentencing cases. The Fifth Circuit's application of the "actual innocence" exception in this noncapital sentencing case widens the already well-developed three-way circuit split.

In holding that the "actual innocence" exception applies in this case, the Fifth Circuit joined the Fourth Circuit (and to some extent the Second) on the side of the debate that extends the exception beyond the realm authorized by this Court—that is, beyond those cases concerning "actual innocence" of the underlying crime or "actual innocence" of the death penalty. On the opposite side of the debate are the Seventh, Eighth, and Tenth Circuits, which have correctly rejected the application of the "actual innocence" exception to noncapital sentencing cases.

The Second, Fourth, and Fifth Circuits's erroneous extension of the "actual innocence" exception beyond the narrow circumstances identified by this Court creates the potential for numerous collateral attacks to state court convictions. By painting with too wide a brush the category of cases that may be creatively described as involving "actual innocence," these circuits' holdings have the dangerous potential of opening the floodgates of habeas claims that allege improper sentencing under the guise of "actual innocence."

Moreover, these circuits' expansion of the "actual innocence" exception into the noncapital sentencing context undermines the procedural bar doctrine—a critical underpinning of federal habeas corpus law. The expansion disregards this Court's traditional adherence to and recognition of the principles of comity, finality, and federalism that likewise form a key basis of federal habeas corpus law.

As six judges noted in dissent from denial of rehearing en banc, "this case squarely presents a legal question of exceptional importance in an unusually pristine form." *Haley II*, App., at 23a. The Court should grant the petition to resolve the circuit split, halt the further degradation of the procedural bar rule, and clarify that the "actual innocence" exception to the procedural bar rule does not apply in the noncapital sentencing context.

ARGUMENT

I. THERE IS A SIGNIFICANT SPLIT IN THE COURTS OF APPEALS AS TO WHETHER THE "ACTUAL INNOCENCE" EXCEPTION TO THE PROCEDURAL BAR RULE APPLIES TO NONCAPITAL SENTENCING-PHASE ERROR.

There is a well-defined and growing split among the courts of appeals regarding the application of the "actual innocence" exception to the procedural bar rule in noncapital habeas corpus cases involving sentencing-phase error. Generally, a federal habeas petitioner may not raise a procedurally defaulted claim unless he demonstrates either (1) clear cause and prejudice for the default or (2) that a miscarriage of justice would result in not considering the claim. *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). The miscarriage of justice exception is also called the "actual innocence" exception. *Sawyer*, 505 U.S., at 339. In ordinary usage, "actual innocence" is generally understood to mean that the petitioner did not actually commit the underlying crime. *Sawyer*, 505 U.S., at 340.

However, this Court has expanded the "actual innocence" exception to the capital sentencing context to include claims that the petitioner is "actually innocent" of the death penalty. *Id.*, at 339-40. At issue in this appeal is whether the Court's *Sawyer* opinion should be further extended to allow a noncapital habeas petitioner to present a procedurally defaulted claim that he is "actually innocent" of the sentence he received—as opposed to a claim that he is not guilty of the underlying crime.

As recognized by both the panel opinion below and the dissent from the denial of the petition for rehearing en banc, the courts of appeals have generated a three-way split on this issue that is clear, wide, and deep.[2] On one side of the split, the Seventh, Eighth, and Tenth Circuits have held that the "actual innocence" exception does not apply at all in noncapital sentencing cases. *See Hope v. United States*, 108 F.3d 119 (CA7 1997) (holding that the "actual innocence" sentencing exception did not survive the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA)); *Embrey v. Hershberger*, 131 F.3d 739 (CA8 1997) (en banc) (holding that the "actual innocence" exception applies only to sentencing in capital cases); *Reid v. Oklahoma*, 101 F.3d 628 (CA10 1996) (holding that the "actual innocence" exception does not apply in cases involving challenges to noncapital sentences); *United States v. Richards*, 5 F.3d 1369 (CA10 1993) (same). On the second side, the Second Circuit has held that the "actual innocence" exception extends to all noncapital sentences. *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162 (CA2 2000). And on the third side of the split, reaching somewhat of a middle ground, the Fourth Circuit—and Fifth as a result of this case—have held that the "actual innocence" exception extends to noncapital sentences imposed under habitual offender statutes. *Haley I*, App., at 1a-

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2. The extent of the circuit split is demonstrated both by the fact that the circuits have split three, as opposed to merely two, ways on this issue and by the fact that there are three courts of appeals decisions on one side of the split (the Seventh, Eighth, and Tenth), one on the second side (the Second), and two on the third (the Fourth and Fifth).

20a; *United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999); *United States v. Maybeck*, 23 F.3d 888 (CA4 1994).

As noted by the Third Circuit in *Cristin v. Brennan*, a noncapital case in which the court assumed, without deciding, that the "actual innocence" exception may apply to overcome a procedural bar, "the issue is not as simple as whether to apply *Sawyer* in a non-capital context; the courts of appeals have debated the types of sentences of which a petitioner can be innocent and whether a claim of innocence of the sentence is actually a disguised attack on the conviction's validity." 281 F.3d 404, 421-22 (CA3 2002). Reflecting the difficult nature of this issue, the courts of appeals have not only been at odds with each other, they have been internally inconsistent, and at various times, have placed themselves on opposite sides of the debate.

For example, the Seventh Circuit had previously held in *Mills v. Jordan*, 979 F.2d 1273 (CA7 1992), that the "actual innocence" exception applies in noncapital cases involving habitual offender sentencing statutes. In *Hope*, however, the court changed course and effectively overruled itself when it held that the "actual innocence" exception did not survive the 1996 amendments to the AEDPA. 108 F.3d, at 120.

Similarly, the Eighth Circuit had previously applied the "actual innocence" exception in a noncapital sentencing case where the defendant was sentenced under a statute that did not apply to him. *Jones v. Arkansas*, 929 F.2d 375, 380-81 (CA8 1991) (stating that "[i]t would be difficult to think of one who is more 'innocent' of a sentence than a defendant sentenced under a statute that *by its very terms* does not even apply to the defendant") (emphasis in original). The court also noted in a

footnote that "there are indications that the actual innocence exception also may apply to non-capital sentencing." *Id.*, at 381 n.16 (citing *Smith v. Murray*, 477 U.S. 527, 538 (1986)). *See also Pilchak v. Camper*, 935 F.2d 145, 148 (CA8 1991) (noting that the Eighth Circuit had "transported the exception into the sentencing phase of a trial"). Subsequent to this Court's opinion in *Sawyer*, however, the Eighth Circuit expressed doubt, in *Higgins v. Smith*, 991 F.2d 440, 441 (CA8 1993), that *Jones* was still good law, before eventually overruling itself, *en banc*, in *Embrey*.

And finally, the Tenth Circuit has changed its position twice since 1993. In *Richards*, a case involving an alleged misapplication of federal sentencing guidelines, the court stated that "a person cannot be actually innocent of a noncapital sentence." 5 F.3d, at 1371. One year later, in *Selsor v. Kaiser*, 22 F.3d 1029, 1036 (CA10 1994), the court suggested that the "actual innocence" exception might apply where a petitioner shows factual innocence of a sentencing element that was not required for proof of an underlying conviction. Coming full circle in *Reid*, another case involving a defendant claiming to be innocent of an enhancement charge, the Tenth Circuit, without mentioning its contrary statement in *Selsor*, held once again that "a person cannot be actually innocent of a noncapital sentence." 101 F.3d, at 630 (citing *Richards*, 5 F.3d, at 1371).

The Fifth Circuit's opinion is the latest in a long line of cases from the courts of appeals grappling with the question of whether the "actual innocence" exception to the procedural bar rule applies to noncapital sentencing. The courts of appeals have generated a stark three-way split that shows no signs of

resolving itself. In recent years, the Court has denied certiorari three times on this issue.[3] The issue has percolated long enough. Because of its importance to the finality of state convictions, the Court should grant the petition and address the issue in this case that is ripe for review.[4]

II. THE APPLICATION OF THE "ACTUAL INNOCENCE" EXCEPTION IN NONCAPITAL SENTENCING CASES RAISES A QUESTION OF NATIONAL IMPORTANCE.

A. The "Actual Innocence" Exception Should Remain a Narrow Exception to the Procedural Bar Rule.

One of the founding principles of federal habeas review is the abiding concern for the "finality of state judgments of conviction and the significant costs of federal habeas review." *Sawyer*, 505 U.S., at 338 (citations omitted). With this principle in mind, the Court has long held that, ordinarily, a federal habeas court may not review procedurally barred claims. *Id.*

The "actual innocence" exception is a narrow exception to the procedural bar rule that has been described by the Court as

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3. *United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999), *cert. denied*, 529 U.S. 1010 (2000); *Embrey v. Hershberger*, 131 F.3d 739 (CA8 1997) (en banc), *cert. denied*, 525 U.S. 828 (1998); *Reid v. Oklahoma*, 101 F.3d 628 (CA10 1996), *cert. denied*, 520 U.S. 1217 (1997).

4. The fact that the mandate has issued in this case does not cause a mootness problem. *See Mancusi v. Stubbs*, 408 U.S. 204, 205-07 & n.1 (1972); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 306-08 (1946).

the "extraordinary case" when a habeas petitioner shows cause and prejudice or "actual innocence." *Sawyer*, 505 U.S., at 339 n.6 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (holding that a habeas petitioner may obtain review of a procedurally defaulted claim only on a showing of cause and prejudice). As originally conceived, the exception contemplated strictly factual innocence—that is, the case where the State has convicted the wrong person of the crime, and not "legal innocence"—meaning mere legal insufficiency. *Sawyer*, 505 U.S., at 339-40. Thus, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S., at 496.

In *Sawyer*, the Court took the next step, extending the "actual innocence" exception beyond its original construction and into the arena of capital sentencing, so that a habeas petitioner who has committed the crime may nonetheless be able to show that he is "actually innocent" of the death penalty if he can show by "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." *Id.*, at 340-41, 348. But, the Court did not, in *Sawyer* or since, extend the "actual innocence" exception beyond the death penalty sentencing context.

Nonetheless, the Second, Fourth, and Fifth Circuits have themselves extended the exception to include claims of sentencing error in the noncapital context. But, if the "actual innocence" exception extends to noncapital cases—whether

only those involving the incorrect application of habitual offender statutes or to all noncapital sentences—these kinds of claims will cease to be "extremely rare." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). A legal claim that a substantive criminal statute has been wrongly applied to specific facts can, by resort to a rather unsophisticated play on words, always be converted into a complaint that the relevant facts did not support the sentence and that therefore the defendant was "actually innocent" of his particular sentence. *See Embrey*, 131 F.3d, at 741.

For example, under the logic of the Second, Fourth, and Fifth Circuits, a habeas petitioner could always raise a procedurally defaulted claim that there was insufficient evidence to support a finding that the underlying crime was aggravated, thus resulting in an improper and, according to the petitioner, illegal sentence. In such a case, the petitioner would simply argue that he was "actually innocent" of the imposed sentence because he was "actually innocent" of having committed an aggravated crime.

But if the "actual innocence" exception is to be applied in that manner, then any claim challenging the legal sufficiency of the evidence can be said to be one of "actual innocence," effectively unraveling the barrier to post-conviction relief that the limited exception of "actual innocence" was meant to maintain. *Id.* The "actual innocence" exception would cease to be a narrow "gateway" through which a habeas petitioner must pass, and would become instead a readily available means to upset state convictions, on grounds never adjudicated in state court. That interpretation of the "actual innocence" exception is untenable, for it could result in a deluge of habeas

claims alleging "actual innocence" of sentencing in countless criminal cases.

B. The Fifth Circuit's Expansion of the "Actual Innocence" Exception to the Noncapital Sentencing Context Conflates the Exception with the Alleged Underlying Constitutional Violation.

The Court's habeas jurisprudence "makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). In other words, a free-standing claim of "actual innocence" will not alone support a claim for habeas relief. *Id.*, at 404-05. Instead, the habeas petitioner must "supplement[] his constitutional claim with a colorable showing of factual innocence." *Id.*, at 404.

By extending the "actual innocence" exception to noncapital cases involving habitual offender statutes, the panel opinion, in effect, allows a free-standing "actual innocence" claim to serve—by itself—as the basis for habeas relief, in direct contradiction to *Herrera*. This is because Haley's claim that he is "actually innocent" of habitual offender status is identical to his underlying and procedurally barred claim that the evidence was insufficient to support his sentencing under the habitual offender statute. Haley claims to be "actually innocent" because he is "actually innocent."[5]

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5. Of course, Haley is not "actually innocent" of being an habitual offender. Factually speaking, he has been convicted of several crimes, five of which are implicated in this case. Instead, he is only "legally

Indeed, the panel opinion demonstrates the error of its own logic. The panel did not—because it could not—first determine that Haley had demonstrated "actual innocence" of his sentence before proceeding to review the underlying procedurally barred claim. Instead, the panel's analysis of Haley's claim of "actual innocence" and his underlying constitutional claim of insufficient evidence collapse into one inquiry of whether the habitual offender statute was correctly applied to Haley. The "actual innocence" exception was never intended to be applied in this circular manner.

The Second, Fourth, and Fifth Circuit's expansion of the "actual innocence" exception to noncapital sentencing ignores the Court's admonitions that the exception should be a "narrow" one. And, it misreads the Court's "actual innocence" jurisprudence by allowing a free-standing claim of "actual innocence" to serve as the constitutional claim supporting habeas relief. If this line of cases is not reversed, the gateway will be open to numerous—and heretofore unsupportable—claims of "actual innocence" being used to excuse procedurally defaulted claims.

III. PRINCIPLES OF COMITY, FINALITY, AND FEDERALISM DICTATE THAT A FEDERAL COURT SHOULD RESPECT A STATE COURT'S FINDING OF A PROCEDURAL BAR.

The touchstone of federal habeas law is the "historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts." *Williams*

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innocent" of habitual offender status in Texas because two of his convictions were not sequential: the second conviction occurred six days before his first became final. *See* TEX. PEN. CODE §12.42(a)(2).

v. Taylor, 529 U.S. 420, 436 (2000). In keeping this delicate balance, the Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Id.*; *see also Coleman*, 501 U.S. 722, 726 (noting that federal courts owe the States and the States' procedural rules deference when reviewing the claims of state prisoners in federal habeas corpus).

The procedural default doctrine is a critical underpinning of federal habeas law. It is "designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). Moreover, the doctrine seeks "to vindicate the State's interest in the finality of its criminal judgments." *Id.* Thus, proper respect of a State court's finding of a procedural bar is crucial to the federal habeas framework and is mandated by our federalism.

Because application of the"actual innocence" exception to the procedural bar rule undermines principles of federalism, it should be narrowly construed. Indeed, this Court has repeatedly emphasized the narrow scope of the exception. *See, e.g., Sawyer*, 505 U.S., at 340-41; *McCleskey*, 499 U.S., at 502; *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989); *Murray*, 477 U.S., at 496. And, until *Sawyer*, the Court found no reason, even in capital cases, to extend the exception beyond the conventional definition that strictly involves "actual innocence" of the crime.

However, as noted by the dissent from the denial of rehearing en banc, language from this Court's "actual

innocence" cases "can be read to point in opposite directions." *Haley II*, App., at 25a. Specifically, the Second, Fourth, and Fifth Circuits find support for their position that the "actual innocence" exception may apply to noncapital sentencing in the Court's suggestion in *Smith* that the availability of the "actual innocence" exception depends not on the "nature of the penalty" the State imposes, but on whether the constitutional error "undermined the accuracy of the guilt or sentencing determination." 477 U.S., at 537-38. These circuits construe that language—taken out of context—to mean that the Court did not intend to prohibit the application of the "actual innocence" exception in noncapital cases. *Haley I*, App., at 13a-14a; *Spence*, 219 F.3d, at 170-71; *Maybeck*, 23 F.3d, at 893 & n.9.

But, when viewed in conjunction with the Court's complete jurisprudence in this area, the better argument is the reverse. While extending the "actual innocence" exception to the capital sentencing context in *Sawyer*, the Court was careful to draw a clear distinction between the concept of "actual innocence" in the context of noncapital versus capital sentencing cases. The Court stated that "[t]he present case requires us to further amplify the meaning of 'actual innocence' in the setting of capital punishment." *Id.*, at 340. Noting that the "prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime," the Court stated that "[i]n the context of a noncapital case, the concept of 'actual innocence' is easy to grasp." *Id.*, at 341. The most logical implication of this statement is that Court intended to expand—or amplify—the "actual innocence" exception to sentencing only

in the unusual circumstance of capital cases. *See Embrey*, 131 F.3d, at 740-41; *Richards*, 5 F.3d, at 1371.

The Court should expand the "actual innocence" exception no further. Empowering federal habeas courts to look past a procedural bar under the "actual innocence" exception sanctions the non-compliance with state procedural rules. It encourages "'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Wainwright*, 433 U.S., at 89. Ultimately, the federal court's ability to disregard state procedural rules undermines the state trial process and "detract[s] from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Id.*, at 90. Thus, principles of comity, finality, and federalism demand that the federal court's power to review procedurally defaulted claims under the guise of "actual innocence" be limited in scope and narrowly conceived.

The Fifth Circuit—following the lead of the Fourth, and to a lesser extent, the Second—erroneously extended the "actual innocence" exception to cases involving noncapital sentencing phase error in the application of habitual offender statutes. The Court should grant the petition to clarify that the "actual innocence" exception does not apply outside the narrow confines already identified by the Court, and in particular, does not apply to overcome a procedural bar in a noncapital sentencing case.

IV. THIS CASE IS AN IDEAL VEHICLE FOR THE COURT TO CONSIDER THE APPLICATION OF THE "ACTUAL INNOCENCE" EXCEPTION TO NONCAPITAL SENTENCING.

Because there is no disagreement as to the underlying facts in this case, it presents an excellent vehicle for the Court to resolve an important and widening circuit split. Indeed, as the dissent from the denial of the Director's petition for rehearing en banc noted, "[t]his purely legal question is unsullied by factual disputes . . . Thus, this case squarely presents a legal question of exceptional importance in an unusually pristine form." *Haley II*, App., at 23a. The Court should take this opportunity to resolve the circuit split on this important issue of law.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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June 13, 2003

APPENDIX

**United States Court of Appeals,
Fifth Circuit.**

**Michael Wayne HALEY, Petitioner-Appellee,
v.
Janie COCKRELL, Director, Texas Department of
Criminal Justice, Institutional
Division, Respondent-Appellant.**

No. 01-41389.

Sept. 27, 2002.

Before DeMOSS, STEWART and DENNIS, Circuit Judges.

CARL E. STEWART, Circuit Judge:

The respondent appeals from the district court's grant of habeas corpus in favor of the defendant, Michael Wayne Haley ("Haley"). Finding no error, we affirm. The only issue before us is whether the district court properly granted habeas relief to Haley for his insufficiency-of-the-evidence claim. Thus, we recite only those facts pertinent to our decision.

FACTUAL AND PROCEDURAL BACKGROUND

Haley, an inmate of the Texas Department of Criminal Justice, Institutional Division, proceeding *pro se,* filed a federal application for writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that his conviction was illegal.

On October 29, 1997, Haley was convicted of a "state jail felony," which is a felony in the second degree, and was sentenced as a habitual felony offender. *See* Tex Penal Code

Ann. §§ 12.35 and 12.42. Antecedent to the conviction, Haley was indicted for theft, a Class A misdemeanor, which was enhanced to a "state jail felony" by his two prior theft convictions. [FN1] In addition, the indictment alleged two prior felony convictions for delivery of amphetamines and aggravated robbery. [FN2] Together, these two prior convictions enhanced his "state jail felony" to a second degree felony. Because the indictment alleged two prior felony convictions, Haley was classified as an habitual felony offender resulting in an enhanced sentence at the punishment phase of his trial.

> FN1. Under Texas law, an offense is classified as a "state jail felony" if the defendant has been previously convicted of two or more thefts. TEX. PENAL CODE ANN. § 31.03(e)(4)(D).
>
> FN2. A defendant commits aggravated robbery if he "uses or exhibits a deadly weapon" during the commission of the offense. TEX. PENAL CODE ANN. § 29.03(a)(2).

During the punishment phase of Haley's trial, the State presented one witness who testified that Haley had been previously convicted of delivery of amphetamines and aggravated robbery. Haley did not cross-examine the State's witness or put on any evidence. After the parties rested, the jury was excused while the trial court prepared the jury instructions. Shortly after the jury was excused, the trial judge realized that the enhancement paragraphs provided in the indictment, concerning Haley's two prior convictions for delivery of a controlled substance and aggravated robbery, had not been read to the jury. Before bringing the jury back into

the courtroom, the trial judge asked Haley if he wanted to enter a plea to the enhancements before the jury. Haley chose not to enter a plea and requested that the trial court not inform the jury that he was given such an opportunity. The next day, the trial court reopened the punishment proceedings to allow the State to read the enhancements to the jury. No mention was made of Haley's decision not to enter a plea, and the State did not reoffer its witness's testimony. Haley did not object to the reading of the enhancement or to the State's failure to reoffer the evidence. The jury found the enhancements alleged in the indictment to be true, and Haley was sentenced to a term of sixteen years and six months imprisonment.

Haley appealed his conviction, arguing, *inter alia*, that the trial court erred in failing to ask him to plead to the enhancement paragraphs of the indictment at the beginning of the punishment phase of his trial and that the trial court erred, during the punishment phase, in allowing the State to reopen its case for the purpose of reading the enhancement paragraphs to the jury. The Texas appellate court affirmed Haley's conviction. The court concluded that any error due to the trial court's failure in not requiring the State to reintroduce Haley's prior convictions, or in allowing the jury to consider his prior convictions before the reading of the enhancements, was waived by Haley's failure to object on those grounds. Further, it found that "any error by the trial court in failing to elicit a plea from Haley to the enhancements after the enhancements were read to the jury [was] waived under the invited error doctrine." [FN3] Thereafter, the Texas Court of Criminal Appeals refused Haley's petition for discretionary review.

FN3. The invited error doctrine precludes a defendant from "complaining on appeal of alleged errors which he invited or induced, especially where the defendant may not have been prejudiced by the error." *United States v. Green*, 272 F.3d 748, 754 (5th Cir.2001).

In February 2000, Haley filed a state habeas application in the trial court raising several challenges to the enhancement of his punishment. The court determined that his application raised the following grounds of error: (1) the theft offense was not properly enhanced in accordance with the Texas Penal Code, (2) the evidence was insufficient to support the enhancements for the prior felony offenses of delivery of amphetamines and aggravated robbery, and (3) ineffective assistance of counsel. The state habeas trial court recommended that the application be denied concluding that (1) the theft offense was enhanced correctly, (2) the sufficiency of the evidence had been raised on direct appeal and thus could not be attacked by a writ of habeas corpus, and (3) Haley's trial counsel was not ineffective. The Texas Court of Criminal Appeals denied Haley's state habeas application based upon the findings of the trial court.

Haley timely filed a § 2254 application in the United States District Court for the Eastern District of Texas in which he alleged the following points of error: (1) there was no evidence to support the chronological order of the enhancements as stated in the indictment, [FN4] (2) there was no evidence presented to support the State's claim that he had previously been convicted of aggravated robbery, (3) the State made an improper jury argument, and (4) he received ineffective assistance of counsel.

FN4. Under the Texas habitual offender statute, "[i]f it is shown on the trial of a state jail felony ... that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony." TEX. PENAL CODE ANN. art. 12.42(a)(2) (Vernon 1995).

With regard to the first alleged error, Haley argued that the aggravated robbery in Cause No. 7-91-1086 was committed on October 12, 1991, and the conviction for delivery of amphetamines in Cause No. 1-89-671 did not become final until October 18, 1991. [FN5] Thus, he contended that the indictment incorrectly stated that the delivery of amphetamines conviction became final "prior to the commission of each of the offenses set out above," and the jury could not have found the enhancement paragraphs factually accurate. In its response to Haley's application, the State conceded that the chronological order of the convictions alleged in the enhancement paragraphs was erroneous.

FN5. With regard to Haley's two prior convictions, the indictment provided in germane part:

[P]rior to the commission of the primary offense by the said MICHAEL WAYNE HALEY ... on the 9th day of September, 1992 ... in Cause Number 7-91-1086, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Aggravated Robbery and said conviction became final prior to the commission of the primary offense.

> [P]rior to the commission of the primary offense by the said MICHAEL WAYNE HALEY ... on the 18th day of October, 1991 ... in Cause Number 1-89-671, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Delivery of Amphetamine and said conviction became final prior to the commission of each of the offenses set out above.

In response to Haley's second allegation, the State argued that Haley's sentence was properly enhanced because he had a prior felony conviction, aggravated robbery, which included an affirmative finding of a deadly weapon. [FN6] However, Haley countered that he was sentenced for attempted robbery which did not contain a finding of a deadly weapon, indicating that this finding was removed by a *nunc pro tunc* judgment. [FN7] The State later conceded that Haley's attempted robbery conviction did not include an affirmative finding of a deadly weapon.

> FN6. Texas law provides that a defendant convicted of a state jail felony will be punished for a third degree felony if it is proven that the defendant had previously been finally convicted of aggravated robbery. TEX. PENAL CODE ANN. art. 12.35(c)(2)(A) (Vernon 1995).

> FN7. After Haley filed his habeas petition and the State filed its response, Haley filed a motion to supplement the state court record with the *nunc pro tunc* judgment. Upon a grant of Haley's motion, the Magistrate judge ordered the State to respond to Haley's contention that he was not convicted of a felony carrying an affirmative finding that a deadly weapon

> was used. The state received a copy of Haley's motion and the *nunc pro tunc* judgment. In its response, the State acknowledged the *nunc pro tunc* judgment and conceded that Haley was not convicted of a felony involving the use of a deadly weapon but argued that Haley is still not entitled to habeas relief because his claim is procedurally barred.

Nonetheless, the State argued that even though there was no finding of a deadly weapon in his robbery conviction, Haley was not entitled to habeas relief because his claim was procedurally barred from federal habeas review. The State emphasized that the state appellate court specifically noted that Haley failed to preserve any issue regarding the enhancement for review on appeal because he had failed to raise them in a timely objection or motion. The State noted that, on habeas review the state trial court concluded that his sufficiency claims could not be raised for the first time in a habeas application, and that the Texas Court of Criminal Appeals denied his state habeas application on the findings of the trial court. The State therefore reasoned that any issue relating to the enhancement that Haley may now be raising would be procedurally barred by his failure to present any contemporaneous objections. [FN8] Alternatively, the State argued that the doctrine of invited error barred Haley from obtaining federal relief, "given his voluntary silence and inaction during trial."

> FN8. Under the Texas contemporaneous objection rule, a petitioner is deemed to have waived any error by failing to raise an objection. *Corwin v. Johnson*, 150 F.3d 467, 472-73 (5th Cir.1998). This Court has held

that the contemporaneous objection rule constitutes an adequate and independent state ground procedurally barring federal habeas review. *Sharp v. Johnson,* 107 F.3d 282, 285-86 (5th Cir.1997).

Upon order of the district court, a magistrate judge issued a report, recommending that Haley's federal habeas application be granted on his claim regarding the improper enhancement of his sentence. [FN9] The judge was not persuaded that Haley's claim was procedurally barred because the state appellate court's decision addressed only those claims raised by Haley on direct appeal. Because Haley had not argued that the robbery charge did not include a finding of a deadly weapon, the magistrate judge found that the state appellate court had not expressly applied the procedural bar to this argument. [FN10] Notwithstanding the procedural bar, the magistrate judge determined that Haley's procedural default was excused because Haley had shown that he was "actually innocent" of a predicate violation required for sentencing as a career offender for a second degree felony. The judge concluded that failure to address this claim would result in a "fundamental miscarriage of justice."

FN9. The magistrate judge did not address Haley's ineffective assistance of counsel claim relating to the sentencing enhancement in light of her recommendation to grant relief. However, the magistrate judge denied Haley's contention that the prosecutor's remarks deprived him of a fair trial as well as Haley's remaining ineffectiveness claims.

FN10. The magistrate judge's report continuously focused on the lack of a finding of a deadly weapon

with respect to Haley's robbery conviction. The State did not rely on the finding of a deadly weapon to support the enhancement during sentencing, however, and Haley's § 2254 application did not raise this issue. The issue of a deadly weapon came up only in the State's response to Haley's § 2254 application when the State offered this argument as an alternative reason to support the enhancement.

After a *de novo* review, the district court adopted the magistrate judge's report and granted Haley's § 2254 application as to the claim that his sentence was improperly enhanced denying him relief on his other claims. Accordingly, the district court ordered the Texas courts to re-sentence Haley without the improper enhancement within ninety days and that should the State fail to do so, his conviction shall be reversed. This Court subsequently granted the State's motion to stay the district court's order of re- sentencing during the appeal of this case. This appeal follows.

STANDARD OF REVIEW

[1] When reviewing a grant of habeas corpus relief, this court reviews the district court's factual findings for clear error and its disposition of pure legal issues and mixed issues of law and fact *de novo. Valdez v. Cockrell,* 274 F.3d 941, 946 (5th Cir.2001). "If a state-court decision rejecting a federal habeas petitioner's constitutional claim rests on an adequate and independent state procedural bar, [a federal habeas court] may not review the merits of the federal claim absent a showing of cause and prejudice for the procedural default, or a showing that failure to review the claim would result in a complete

miscarriage of justice." *Muhleisen v. Ieyoub,* 168 F.3d 840, 843 (5th Cir.1999).

[2] The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides for deference in reviewing claims in a state prisoner's habeas corpus application that were *adjudicated on the merits* in state-court proceedings. 28 U.S.C. § 2254(d). A federal court must defer to a state court's resolution of both pure questions of law and mixed questions of law and fact unless the state court's determination was "contrary to" or an "unreasonable application" of clearly established federal law as determined by the Supreme Court. § 2254(d)(1). A § 2254 applicant may also receive habeas corpus relief regarding a claim adjudicated on the merits in state court if the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(2). The deferential standards set forth by AEDPA, however, do not apply where the state court denied the petitioner's claim on procedural grounds. *See Valdez v. Cockrell,* 274 F.3d at 946-48 ("Section 2254(d)'s deference operates when the state court has adjudicated the petitioner's claim on the merits.... An 'adjudication on the merits' occurs when the state court resolves the case on substantive grounds, rather than procedural grounds."); *see also Fisher v. Texas,* 169 F.3d 295, 300 (5th Cir.1999) (concluding that when a state habeas court decides a habeas applicant's claim on procedural grounds, there has not been an "adjudication on the merits"). Because the state habeas court dismissed this claim on procedural grounds, the deferential standards under § 2254(d) do not apply.

DISCUSSION

[3][4][5] Under the procedural-default doctrine, federal courts are precluded from granting habeas relief where the last state court to consider the claims raised by the petitioner expressly and unambiguously based its denial of relief on an independent and adequate state-law procedural ground. *Coleman v. Thompson,* 501 U.S. 722, 729-30, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Hughes v. Johnson,* 191 F.3d 607, 614 (5th Cir.1999). When a state court explicitly relies on a procedural bar, a state prisoner may not obtain federal habeas relief absent a showing of cause for the default and actual prejudice. *Coleman,* 501 U.S. at 750, 111 S.Ct. 2546; *Wainwright v. Sykes,* 433 U.S. 72, 84-85, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). A petitioner who fails to satisfy the cause-and-prejudice standard may nonetheless be entitled to habeas relief if he can show that the imposition of the procedural bar would constitute a miscarriage of justice-i.e., that the petitioner is *actually innocent* of the crime. *Sawyer v. Whitley,* 505 U.S. 333, 339-40, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992); *Finley v. Johnson,* 243 F.3d 215, 220 (5th Cir.2001). "In order to be actually innocent of a non-capital sentence, the petitioner must show that 'but for the constitutional error he would not have been legally eligible for the sentence he received.'" *Sones v. Hargett,* 61 F.3d 410, 418 (5th Cir.1995) (citing *Smith v. Collins,* 977 F.2d 951, 959 (5th Cir.1992)).

I. Procedural Default

[6][7][8] The State asserts that Haley's insufficiency-of-the-evidence claims are procedurally barred because he failed to raise any objection to the enhancement at trial. A state

prisoner is generally required to exhaust all available state remedies before applying for federal relief. *See Nobles v. Johnson,* 127 F.3d 409, 419-20 (5th Cir.1997). Under Texas law, sufficiency of the evidence may be raised on direct appeal, but is not cognizable on collateral review. *See Clark v. State of Tex.,* 788 F.2d 309, 310 (5th Cir.1986). Thus, in order to exhaust his claims, Haley was required to raise them in a petition for discretionary review. *See Richardson v. Procunier,* 762 F.2d 429, 429 (5th Cir.1985). He did not. Haley is procedurally barred from raising his insufficiency-of-the-evidence claims in state court because his time to file a petition for discretionary review has expired. *See* Tex.R.App. P. 68.2.

[9] Because Haley has failed to exhaust his insufficiency-of-the-evidence claims, federal review is barred unless he can show cause and actual prejudice from the procedural default, or that failure to review the claim would result in a complete miscarriage of justice due to his "actual innocence." *See Muhleisen,* 168 F.3d at 843. Haley has not alleged cause or actual prejudice. Thus, we must determine whether Haley's claim can be reviewed under the actual-innocence exception to the procedural bar. An actual innocence claim is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Dowthitt v. Johnson,* 230 F.3d 733, 741 (5th Cir.2000) (quoting *Herrera v. Collins,* 506 U.S. at 404, 113 S.Ct. 853). Haley has made such a claim.

II. Actual Innocence Exception

[10] The State argues that the district court erred in applying the actual- innocence exception to the instant case because it

involves a noncapital offense. This court has twice assumed, without holding that the "actual innocence" exception is available in a noncapital sentencing context. *See Sones v. Hargett,* 61 F.3d 410, 413 (5th Cir.1995); *Smith v. Collins,* 977 F.2d 951, 959 (5th Cir.1992). Until this case, we have left open the issue of whether the exception applies to sentencing in noncapital cases. We now hold that the actual innocence exception applies to noncapital sentencing procedures involving a career or habitual felony offender.

The magistrate judge recognized that the extension of the actual innocence standard to noncapital cases was *dicta* in *Smith* and *Sones.* Nevertheless, the magistrate judge applied the standard and concluded that it is clear from the record that Haley was "actually innocent" of the predicate felony conviction necessary to enhance his conviction from a state jail felony to a second-degree felony. By extension, the magistrate judge concluded that because Haley is "actually innocent" of having two prior felony convictions, Haley's sentence was improperly enhanced as a habitual felony offender. The district court adopted the magistrate judge's finding and granted habeas relief as to the claim that Haley's sentence was improperly enhanced. We agree with the district court that, based on the unquestionable improper enhancement of Haley's sentence, he has shown that, but for the constitutional error, he would not have been legally eligible for the sentence he received.

[11][12] The State argues that this issue has not been addressed by the Supreme Court. Although the Court has not expressly extended the actual innocence exception to noncapital offenses, it considered whether a petitioner was

actually innocent of the aggravating factors necessary for a capital sentence. *See Sawyer v. Whitley*, 505 U.S. 333, 345, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). The Court did not foreclose the application of the actual innocence exception to noncapital sentencing cases. More importantly, the Court has noted that the purpose of the rule "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (citation omitted). With this fundamental purpose in mind, we agree with the Fourth Circuit which has held that the actual innocence exception applies to non capital cases only in the context of a habitual offender finding during the punishment phase of the trial.

The State further notes that other Circuit Courts are split on the issue of whether, in the sentencing context, the actual innocence exception applies to capital cases only or also to noncapital cases. *Compare Spence v. Superintendent, Great Meadow Correctional Facility*, 219 F.3d 162, 171 (2nd Cir.2000) (holding that the actual innocence exception applies to noncapital sentencing when a predicate act for enhancement is at issue) *with Embrey v. Hershberger*, 131 F.3d 739, 740 (8th Cir.1997) (en banc) (holding that the actual innocence exception applies "to the sentencing phase of death cases") *cert. denied*, 525 U.S. 828, 119 S.Ct. 78, 142 L.Ed.2d 61 (1998).

The Eighth, Seventh, and Tenth Circuits have held that in the sentencing context, the actual innocence exception applies only to sentencing in capital cases. *See Embrey*, 131 F.3d at 740; *Hope v. United States*, 108 F.3d 119, 120 (7th Cir.1997)

(determining that the actual innocence exception to noncapital sentencing proceedings did not survive the enactment of the AEDPA); *Reid v. Oklahoma*, 101 F.3d 628, 630 (10th Cir.1996) (holding that the actual-innocence exception does not apply in cases involving challenges to noncapital sentences). In contrast, the Fourth and Second Circuits have applied the actual innocence exception to sentencing in noncapital cases. *See Spence*, 219 F.3d at 171, *United States v. Mikalajunas*, 186 F.3d 490, 494-95 (4th Cir.1999) (limiting *Maybeck* to the "context of eligibility for application of a career offender or other habitual offender guideline provision.") *cert. denied*, 529 U.S. 1010, 120 S.Ct. 1283, 146 L.Ed.2d 230 (2000); *United States v. Maybeck*, 23 F.3d 888, 893-94 (4th Cir.1994) (holding that actual innocence of a noncapital sentence applies to eligibility for sentencing as a career or habitual offender). [FN11]

> -FN11. The Third Circuit, like this Circuit has "assumed *arguendo*" that the actual innocence exception applies to noncapital sentencing. *See Cristin v. Brennan*, 281 F.3d 404, 422 (3rd Cir.2002) (noting that some courts have applied the actual innocence exception to noncapital sentencing cases in the context of factual findings of prior convictions on which the noncapital sentence is based).

The Second Circuit extended the actual innocence exception to noncapital sentencing proceedings. *See Spence*, 219 F.3d at 171. The court reasoned that the "[Supreme] Court has made clear that the availability of [the] actual innocence exception depends not on the 'nature of the penalty,' the state imposes, but on whether the constitutional error 'undermined the

accuracy of the guilt or sentencing determination.'" *Id.* (quoting *Smith v. Murray*, 477 U.S. 527, 537-38, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). Thus, finding no reason to limit the exception to capital cases, the *Spence* court broadly applied the actual innocence exception to the sentencing phase of noncapital cases "[b]ecause the harshness of the sentence does not affect the habeas analysis and the ultimate issue, the justice of the incarceration, is the same." *Id.*

The Fourth Circuit initially extended the actual innocence standard to noncapital cases reasoning that application of the actual innocence exception to the aggravating factors of a capital sentencing case is functionally equivalent to applying the exception to aggravating factors enhancing a noncapital sentence under the guidelines. *See Maybeck*, 23 F.3d at 893. Thus, applying the actual innocence exception in either case meets the "objective of protecting defendants from sentencing based on elements of crimes for which they are conclusively innocent." *Id.* at 894. However, the Fourth Circuit narrowed the exception to noncapital cases "only in the context of eligibility for application of a career offender or other habitual offender guideline provision." *Mikalajunas*, 186 F.3d at 495. The court reasoned that to broaden the exception further would "swallow" the "cause portion of the cause and prejudice requirement" and it "would conflict squarely with Supreme Court authority indicating that generally more than prejudice must exist to excuse a procedural default." *Id.* at 494-95. We find the approach of the Fourth Circuit persuasive.

The State argues on appeal, that *Sones* is not binding on this Court because it expressly declined to hold that the actual-innocence exception applied to noncapital sentencing.

Although in *Smith* and *Sones*, we have assumed that the actual innocence standard extends to non-capital sentencing, in both of those cases, we ultimately concluded that the petitioner in question was not "actually innocent." *See Smith*, 977 F.2d at 959; *Sones*, 61 F.3d at 419- 21. In this case, we conclude that although Haley is procedurally barred from raising his insufficiency-of-the-evidence claim, the actual innocence exception to the procedural bar applies. Having concluded that the actual innocence exception applies to this case, we must now consider the merits of Haley's insufficiency-of-the-evidence claims. This Court has held that the granting of habeas relief is appropriate where the State has failed to produce sufficient evidence of the petitioner's habitual offender status. *See French v. Estelle*, 692 F.2d 1021, 1024-25 (5th Cir.1982).

III. Insufficiency Of The Evidence

[13] The State argues that Haley is inappropriately raising an insufficiency-of-the-evidence claim in a state writ of habeas corpus petition. Haley counters that he is not raising an insufficiency-of-the-evidence claim. Instead he asserts that there is *no* evidence that he was convicted of a felony involving the use of a deadly weapon, to support the enhancement. The State's argument that these claims are insufficiency-of-the-evidence claims is supported by federal and state law. In *Jackson v. Virginia*, the Supreme Court found that the standard for habeas review of the sufficiency of the evidence to support a state conviction is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt. 443 U.S.

307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This Court has applied the *Jackson* standard to habeas claims where the defendant asserted that there was *no evidence* to support the enhancement convictions. *See French v. Estelle*, 692 F.2d at 1024-25. (applying the *Jackson* standard of review to a federal habeas claim that the Government produced *no evidence* showing the date upon which a second offense occurred for purposes of enhancement); *see also Ex Parte Williams*, 703 S.W.2d 674, 679-81 (Tex.Crim.App.1986) (holding that a claim that the State presented no evidence of when a second prior felony was committed did not constitute a *no evidence* claim, but rather a collateral attack on the sufficiency of the evidence).

In *United States v. Maybeck*, the Fourth Circuit applied the actual innocence exception to a procedural default where the defendant's non-capital sentence was improperly enhanced on the basis of his miscalculated career offender status. 23 F.3d at 893-94. Maybeck pled guilty to bank robbery and the unlawful possession of a firearm. During the punishment phase of his trial, the defendant mischaracterized a prior conviction as involving violence. *Id.* That conviction along with a second prior conviction constituted the two predicate felonies necessary to qualify Maybeck as a career offender, a status used to enhance his sentence. *Id.* at 890-91. The Fourth Circuit determined that Maybeck was actually innocent of the predicate offense that qualified him as a career offender, and therefore, it was a miscarriage of justice to enhance his sentence under the career offender provision of the guidelines. *Id.* at 894.

Haley's circumstance is fundamentally equivalent to the circumstances addressed in *Maybeck*. During the punishment phase of his trial, Haley's prior conviction for aggravated robbery was mischaracterized as one involving a deadly weapon. That mischaracterization and his second predicate felony, delivery of methamphetamine, qualified Haley as a habitual felony offender under the Texas sentencing guidelines. In fact, the State has conceded that Haley was not convicted of aggravated robbery involving a deadly weapon. We conclude that a rational trier of fact could not have found beyond a reasonable doubt that Haley has been convicted of two felonies, an essential element of the habitual felony offender provision of the Texas sentencing guidelines because Haley is actually innocent of being convicted for aggravated robbery.

In the present case, this finding of "actual innocence" only entitles Haley to a correction of the improper enhancement of his sentence for his state jail felony conviction. In order to be sentenced as a habitual felony offender, the Texas Penal Code requires that Haley must have been previously convicted of *two felonies* and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final. The State conceded, and the district court found, that the chronological order of the convictions alleged in the enhancement paragraphs was erroneous and, more significantly for the purposes of this appeal, that Haley was not convicted of aggravated robbery involving a deadly weapon. Haley was not convicted of two felonies. Thus, the requirements of the Texas habitual felony offender statute have not been satisfied resulting in Haley's actual innocence of his status as an habitual felony offender,

and consequently, the improper enhancement of his sentencing for his state jail felony.

If we were to condemn Haley to suffer the consequences of an affirmative finding which, by virtue of the *nunc pro tunc* judgment, never existed, he would continue serving a sentence as an habitual offender of which he is in fact innocent. This is a classic example of a "fundamental miscarriage of justice," precisely what the actual innocence exception was created to prevent. We therefore affirm the district court's grant of habeas relief and vacate the stay of the district court's order entered by this court.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's ruling, VACATE the stay entered by this Court, and REMAND to the United States District Court for the Eastern District of Texas for further proceedings in accordance with this opinion.

AFFIRMED.

United States Court of Appeals,

Fifth Circuit.

Michael Wayne HALEY, Petitioner-Appellee,

v.

Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional

Division, Respondent-Appellant.

No. 01-41389.

March 19, 2003.

ON PETITION FOR REHEARING EN BANC

(Opinion Sept. 27, 2002, 5th Cir., 306 F.3d 257)

Before DeMOSS, STEWART and DENNIS, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of the members of the court, and a majority of the judges who are in regular active service not having voted in favor (Fed. R.App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

JERRY E. SMITH, Circuit Judge, with whom JOLLY, JONES, BARKSDALE, EMILIO M. GARZA and CLEMENT, Circuit Judges, join, dissenting from the denial of rehearing en banc:

This exceptionally important case deserves the attention of the en banc court. For the first time, we extend the "actual innocence" exception for procedurally defaulted habeas corpus claims to non-capital sentences. The federal courts of appeals are split three ways on this question, and the panel opinion aligns this court with one of the two positions adopted by only one other circuit. Before this decision is set in stone as binding circuit precedent, the issue should receive review and thorough consideration by the entire court.

I.

In general, a habeas petitioner may not raise a procedurally defaulted claim, i.e., a claim not presented to the state court, unless he demonstrates cause for the default and prejudice from the alleged constitutional violation. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). A petitioner may, however, obtain a hearing on a procedurally defaulted claim if he demonstrates his actual innocence of the underlying offense, even if he cannot satisfy the general cause-and-prejudice test. *Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). "Actual innocence" in that context means the petitioner did not commit the crime.

The Supreme Court has extended the actual innocence exception for the cause- and-prejudice test to the context of capital sentencing, meaning a petitioner who has committed the crime may, nonetheless, be "actually innocent" of the penalty of death. *Sawyer v. Whitley,* 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Neither the Supreme Court nor this court, however, has extended the exception to non-capital sentences. [FN1]

This case presents a perfect opportunity for the full court to consider whether to extend the exception to non-capital sentences where the petitioner is not actually innocent of the crime. This purely legal question is unsullied by factual disputes: Texas concedes that Haley was not eligible under Texas law for the sentence he received, because the indictment wrongly alleged that Haley's prior drug conviction was final before he committed his prior robbery, a chronological order necessary to Haley's sentence enhancement. [FN2]

It bears repeating that Texas concedes this error and argues only that the actual innocence exception should not extend to non-capital sentences. Thus, this case squarely presents a legal question of exceptional importance in an unusually pristine form.

II.

A.

In various procedural settings, three circuits have held that the actual innocence exception does not extend to any non-capital sentences. [FN3] In a 28 U.S.C. § 2255 case, the Eighth Circuit held that the actual innocence exception does not apply to non-capital sentences. *Embrey v. Hershberger,* 131 F.3d 739 (8th Cir.1997) (en banc). The court carefully reviewed Supreme Court precedent, in particular *Sawyer,* and concluded that "*Sawyer,* in terms, applies only to the sentencing phase of death cases." *Embrey,* 131 F.3d at 740.

The Eighth Circuit also relied on the Tenth Circuit's decision in *United States v. Richards,* 5 F.3d 1369, 1371 (10th Cir.1993), which refused to extend the exception. In *Richards,* the court upheld the government's objection to a second § 2255

motion, based on the abuse of writ doctrine. *Id.* at 1370. The petitioner had argued that he should be allowed to file a second motion based on a showing of actual innocence of his non-capital sentence. *Id.* at 1371. The Tenth Circuit rejected this argument out of hand: "A person cannot be actually innocent of a noncapital sentence[.]" *Id.* The Tenth Circuit has reaffirmed this holding, in a 28 U.S.C. § 2254 case, after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Reid v. Oklahoma,* 101 F.3d 628, 630 (10th Cir.1996).

Similarly, if more dramatically, the Seventh Circuit has held that the exception does not survive AEDPA. *Hope v. United States,* 108 F.3d 119 (7th Cir.1997). The prisoner sought permission to file a second § 2255 motion based solely on an improper sentencing enhancement. *Id.* at 120. The court reasoned that AEDPA allows second petitions only if no reasonable factfinder would have convicted the prisoner of the "offense." *Id.* Thus, the Seventh Circuit, concluding that AEDPA eliminated the exception, overruled its caselaw extending the exception to non-capital sentences. *Id.* (citing *Mills v. Jordan,* 979 F.2d 1273, 1278 (7th Cir.1992)).

On the second side of the three-way split, the Second Circuit alone has held that the actual innocence exception extends to all non-capital sentences. *Spence v. Superintendent, Great Meadow Corr. Facility,* 219 F.3d 162 (2d Cir.2000). In *Spence,* the prisoner's probation was rescinded and replaced with a sentence of up to twenty-five years' imprisonment for which he was not legally eligible. *Id.* at 165. The Second Circuit, however, did not equivocate or rest on the severity of the wrongly-imposed sentence. The court held that the actual

innocence exception applies across the board "to the sentencing phase of a noncapital trial." *Id.* at 171.

Alone on the third side of the split--alone, that is, until joined by the panel in the instant case--the Fourth Circuit has held that the actual innocence exception extends only to those non-capital sentences imposed under habitual offender statutes. Like the Second Circuit, the Fourth Circuit originally had held that the actual innocence exception extends to all non- capital sentences. *United States v. Maybeck,* 23 F.3d 888, 893 (4th Cir.1994).

Five years later, the Fourth Circuit, perhaps recognizing that this holding was untenable, limited the scope of *Maybeck. United States v. Mikalajunas,* 186 F.3d 490 (4th Cir.1999). Citing the frightening practical results of *Maybeck* and its tension with Supreme Court caselaw, the court held that the actual innocence exception "applies in noncapital sentencing only in the context of eligibility for application of a career offender or other habitual offender guideline provision." *Id.* at 495. This holding provoked a vigorous dissent arguing that the distinction was unprincipled and unsustainable. *Id.* at 497-502 (Murnaghan, J., dissenting). This court's panel has chosen to adopt the reasoning used in *Mikalajunas.*

B.

Unfortunately, the Supreme Court has not addressed this question. Indeed, the limited implications of its caselaw can be read to point in opposite directions. Given the exceptional importance of the question and the lack of guidance from above, the full court should have reheard this case.

The panel finds support in *Sawyer* and *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The panel observes that "[t]he Court did not foreclose [in *Sawyer*] the application of the actual innocence exception to noncapital sentencing cases." *Haley*, 306 F.3d at 265. This is correct, but *Sawyer* did not present the question. Moreover, some language in *Sawyer* indicates that the Court did not intend the lower courts to extend the actual innocence exception to non-capital sentencing cases.

The Court "acknowledged that actual innocence 'does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense.'" *Sawyer*, 505 U.S. at 340 (quoting *Smith v. Murray*, 477 U.S. 527, 537, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The Court then observed that "[a] prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Id.* This example indicates why, "[i]n the context of a *noncapital* case, the concept of 'actual innocence' *is easy to grasp.*" *Id.* at 341, 112 S.Ct. 2514 (emphases added). Finally, the Court described its task in *Sawyer* as "striv[ing] to construct an analog to the *simpler situation* represented by the case of a noncapital defendant." *Id.* (emphasis added).

The Tenth and Eighth Circuits inferred from this reasoning that the Supreme Court never intended the lower courts to extend the actual innocence exception to non-capital sentencing cases. Otherwise, why is the concept of actual innocence so "easy to grasp" in the non-capital context? And why is a non- capital case a "simpler situation"? In the Tenth Circuit's view, it is "because it simply means the person didn't

commit the crime." *Richards*, 5 F.3d at 1371. The Eighth Circuit concluded that "the most natural inference to draw from these observations on the Court's part is that" the actual innocence exception should not extend to non-capital sentencing. *Embrey*, 131 F.3d at 741.

At the same time, other language in *Sawyer* suggests the Court's openness to applying the actual innocence exception to non-capital sentences. For example, the Court stated that "[i]n *Smith*, [it] found no miscarriage of justice in the failure to examine the merits of procedurally defaulted claims *in the capital sentencing context.*" *Sawyer*, 505 U.S. at 339, 112 S.Ct. 2514 (emphasis added) (citation omitted). The Court also stated that "[t]he present case requires us to further amplify the meaning of 'actual innocence' *in the setting of capital punishment.*" *Id.* at 340, 112 S.Ct. 2514 (emphasis added).

The meanings of these passages are debatable. One might argue, though, that the Court would not have added the qualifying phrases "in the capital sentencing context" or "in the setting of capital punishment" if it intended to extend the exception only to capital sentences.

But "[m]ore importantly," according to the panel, "the Court has noted that the purpose of the [actual innocence] rule 'is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.'" *Haley*, 306 F.3d at 265 (quoting *Herrera*, 506 U.S. at 404, 113 S.Ct. 853). *Herrera*, however, is not especially helpful to the question before this court.

In *Herrera*, the petitioner claimed to be innocent of the murder of which he was convicted. Haley, on the other hand, is not innocent, nor does he claim to be; he is a recidivist offender duly convicted after a full and fair trial and whose conviction the state courts repeatedly upheld on appeal and collateral review. Further, the Supreme Court denied relief in *Herrera*. Even if we were to conclude that the actual innocence exception extends to non-capital sentences, therefore, *Herrera* would not support the extension.

In light of the limited guidance from the Supreme Court, and ambiguity in what guidance there is, the en banc court should have reheard this case to determine whether and, if so, how the actual innocence exception applies to non-capital sentences. Accordingly, I respectfully dissent from the denial of rehearing en banc.

FN1. We have assumed twice, without deciding, that the exception extends to non-capital sentences. *See Sones v. Hargett*, 61 F.3d 410, 413 (5th Cir.1995); *Smith v. Collins*, 977 F.2d 951, 959 (5th Cir.1992).

FN2. The panel suggests a second error in the indictment, namely, an erroneous allegation that Haley's prior robbery offense involved a deadly weapon. *Haley v. Cockrell*, 306 F.3d 257, 261 & n. 7, 262, 263 & n. 10, 264, 267 (5th Cir.2002). In his response to the petition for rehearing en banc, Haley concedes that any such error is irrelevant, because his enhancement rested solely on the chronological order of his convictions.

FN3. *See Haley*, 306 F.3d at 265 (collecting cases).

Neither the cause-and-prejudice test nor the actual innocence exception to that test varies based on the posture of the case. Indeed, *Sawyer*, which first applied the actual innocence exception to capital sentences, was a successive-writ case, not an ordinary procedural-default case.

[Final Judgment filed October 29, 2001]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MICHAEL WAYNE HALEY §

v. § CIVIL ACTION NO.

6:00CV518

DIRECTOR, TDCJ-ID §

FINAL JUDGMENT

The above-styled application for the writ of habeas corpus having come before the Court for consideration, and a decision having been duly rendered, it is hereby

ORDERED and ADJUDGED that relief is granted to the Petitioner as to his claim that his sentence was improperly enhanced. The above-styled application for the writ of habeas corpus is hereby GRANTED as to this claim, and the State of Texas shall have ninety (90) days in which to re-sentence Haley without the improper enhancement of his sentence. Should the State fail to do so, his conviction shall be reversed. It is further

ORDERED and ADJUDGED that no relief is granted to Haley on the remaining claims in his petition.

SIGNED this 27th day of October, 2001.

/s/ T. John Ward

T. JOHN WARD

UNITED STATES DISTRICT JUDGE

[Final Judgment filed October 29, 2001]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MICHAEL WAYNE HALEY §

v. § CIVIL ACTION NO.

6:00CV518

DIRECTOR, TDCJ-ID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ENTERING FINAL JUDGMENT

The Petitioner Michael Wayne Haley, proceeding *pro se*, file this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the validity of his conviction. This Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Haley was convicted of misdemeanor theft on October 29, 1997. His sentence was enhanced to a second-degree felony by two prior convictions, for aggravated robbery and delivery of a controlled substance. The indictment charged him with having committed aggravated robbery, which offense became final prior to the commission of the theft, and with

having committed delivery of amphetamines, which offense became final prior to the commission of the robbery and of the theft. However, Haley pointed out, and the Respondent conceded, that the indictment was in fact incorrect; the conviction for delivery of amphetamines did not become final until after the commission of the aggravated robbery.

Nonetheless, the Respondent argued that Haley's sentence was properly enhanced because the robbery conviction carried a finding that a deadly weapon was used in the commission of the offense. According to the Respondent, Section 12.35 of the Texas Penal Code provides that a person convicted of a state jail felony shall be punished for a third degree felony if it is shown that the person had previously been finally convicted of any felony for which the judgment contains an affirmative finding of a deadly weapon. Additionally, the Respondent says, Haley had been previously convicted of the felony offense of delivery of a controlled substance, raising the level of punishment to that of a second-degree felony under Tex. Penal Code section 12.33. Haley received a sentence of 16 years and 6 months, falling within the range of a second-degree felony; thus, the Respondent concludes that the punishment was properly enhanced.

Haley responded to this argument by pointing out that the finding of the deadly weapon in the robbery conviction had been removed by a *nunc pro tunc* judgment. The Respondent, in reply to this assertion, conceded that the finding of the deadly weapon had been removed, but contended that Haley's claim had been procedurally defaulted because he did not raise any objections to the enhancement provisions at sentencing.

On September 14, 2001, the Magistrate Judge entered a Report recommending that relief be granted to Haley on this point. The Magistrate Judge set out the relevant state sentencing statutes, Sections 12.35 and 12.42, Tex. Penal Code, and observed that Haley's argument that he should properly have been sentenced under Section 12.35(a), not 12.35(c), had "substantial force."

In addressing the Respondent's procedural default contention, the Magistrate Judge observed that whether Haley's claim was defaulted at all was not clear, because the decision of the Court of Appeals' discussion focused on the events of the trial at sentencing rather than the improper enhancement provisions. The Magistrate Judge noted that Haley could hardly have been expected to complain at sentencing about the deadly weapon finding in the aggravated robbery conviction because the State was not relying on this finding for enhancement, but instead on the two prior convictions; indeed, the deadly weapon finding in the prior robbery conviction does not even appear in the indictment for the theft case.

The Magistrate Judge further concluded that even if a procedural bar existed, its application would amount to a fundamental miscarriage of justice because it would render Haley subject to a sentence for a second-degree felony when there exists no basis in the law for such a sentence. The Magistrate Judge stated that this would "condemn Haley to suffer the consequences of an affirmative finding which, by virtue of the *nunc pro tunc* judgment, never existed." Thus, the Magistrate Judge recommended that relief be granted on this claim and that the State be given 90 days in which to re-

sentence Haley without the improper enhancement of his sentence, and that his conviction be reversed if the State failed to do so. The Magistrate Judge also recommended that Haley's remaining grounds of error in his petition be denied.

The Respondent filed objections to the Magistrate Judge's Report on October 18, 2001. The Respondent argues first that Haley procedurally defaulted his claim by failing to make any objections to the enhancement paragraphs at sentencing. The Respondent brushes aside the fact that the last reasoned opinion from the state court made no mention of a failure to object to the propriety of the enhancement paragraphs *per se*, saying that the "contemporaneous objection rule" is an adequate and independent state law ground for denying relief.

The Respondent next argues that Haley's claim is procedurally defaulted because the precise claim which he raised is that the evidence is insufficient to support chronological order of the enhancements and that no evidence was presented to support the state's claim that he had previously been convicted or robbery. However, the Respondent says, sufficiency of the evidence is no cognizable in state habeas corpus, but only on direct appeal; thus, because Haley only raised his claim on this point through the state habeas corpus proceedings, it is procedurally defaulted in federal court. This contention is without merit because a fair reading of Haley's petition shows that his challenge is to the propriety of the enhancement provisions, not the sufficiency of the evidence *per se*.

The Magistrate Judge also concluded that, even if the claim was procedurally defaulted, this default was excused because it would constitute a fundamental miscarriage of justice. The Respondent correctly notes, as did the Magistrate Judge, that the Fifth Circuit's holding that the actual innocence standard applies to non-capital sentencing procedures was made in dicta. Sones v. Hargett, 61 F.3d 410, 419 and n. 16 (5th Cir. 1995). However, the Respondent then simply states that Haley "has never shown cause for failing to challenge the enhancement," without addressing the injustice inherent in sentencing Haley for a second-degree felony when such sentence is not legally available.

Finally, the Respondent argues that Haley "invited error" in the proceedings by declining to enter a plea to the enhancement proceedings during trial. The Respondent notes that the Court of Appeals found that Haley had invited error, but fails to mention the error which he invited was that he was not given an opportunity to plead to the enhancement paragraphs in the presence of the jury. Clearly Haley did not "invite the error" of being sentenced based on a deadly weapon finding which did not exist. This contention is without merit.

The Court has conducted a careful *de novo* review of the Petitioner's petition, the answer and supplemental answer filed by the Respondent, the state court records, the Report of the Magistrate Judge, the Respondent's objections thereto, and all other filings in the cause. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the Respondent's objections are without merit.

ORDERED that the Respondent's objections are overruled and the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the Petitioner's application for the writ of habeas corpus be and hereby is GRANTED as to the claim that his sentence was improperly enhanced. It is further

ORDERED that the Texas courts shall have ninety (90) days in which to re-sentence Haley without the improper enhancement of his sentence. It is further

ORDERED that the Petitioner's conviction shall be reversed if the Texas courts fail to re-sentence him within ninety days. It is further

ORDERED that the remaining claims raised by Haley in this petition be and hereby are DENIED. It is further

ORDERED that all motions which may be pending in this application are hereby

DENIED. Finally, it is

ORDERED that the Order of Reference to the United States Magistrate Judge is hereby VACATED. 28 U.S.C. §636(b).

SIGNED this 27th day of October, 2001.

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

[Final Judgment filed September 14, 2001]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MICHAEL WAYNE HALEY §

v. § CIVIL ACTION NO. 6:00CV518

DIRECTOR, TDCJ-ID §

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Petitioner Michael Wayne Haley, an inmate of the Texas Department of Criminal Justice, Institutional Division proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. The petition has been referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judges.

Haley states that he was convicted of theft in the 7th Judicial District Court of Smith County on October 29, 1997. He took a direct appeal of this conviction, which was affirmed by the Sixth Judicial District Court of Appeals on January 12, 1999. Haley filed a petition for discretionary review of this

decision, which was refused by the Texas Court of Criminal Appeals on May 26, 1999. Haley also filed a state habeas corpus petition on February 24, 2000; this petition was denied without written order on the findings of the trial court without a hearing by the Court of Criminal Appeals on June 21, 2000.

The facts of the case, as stated in the opinion of the Court of Appeals, are as follows:

> Chad Lanier, a loss prevention associate for Wal-Mart, testified that he observed Haley carrying a blue and white box, which Lanier believed contained a Texas Instruments calculator, down the back aisle of the store. Lanier testified that Haley turned his back to him and appeared to put the merchandise in the front of his pants. Haley then walked out of th store exit near the automotive department.
>
> Lanier then watched Haley get into a truck and drive around to the front of the store. Although Haley left the inside of the store, he remained on Wal-Mart property during the entire episode. Lanier never lost site of Haley. Haley then reentered the store through the front door carrying a blue and white box. Haley approached the service desk and was able to exchange the calculator for other merchandise. Lanier then approached Haley, identified himself as a loss prevention associate, and asked Haley to accompany him to the back of the store.

Haley v. State, slip op. no. 06-98-00040-CR (Tex.App.-Texarkana 1999, pet. ref'd).

In his petition, Haley raises four primary grounds for relief. These are: (1) there was no evidence to support the chronological order of the enhancements; (2) there was no evidence presented to support the State's claim that Haley had previously been convicted of robbery; (3) the State made an improper jury argument, and (4) Haley received ineffective assistance of counsel in nine particulars. The respondent has been ordered to answer the petition and has done so; Haley has filed a response to the answer. His grounds for relief will be addressed in turn.

In his first ground for relief, Haley says that his sentence in this case was enhanced by two prior convictions; no. 7-91-1086, for aggravated robbery, and no. 1-89-671, for delivery of a controlled substance. Haley points out that the enhancement portion of the indictment reads as follows:

> AND THE GRAND JURORS AFORESAID, do further present, that prior to the commission of the primary offense by the said MICHAEL WAYNE HALEY, to-wit: on the 9th day of September, 1992, in the 7th Judicial District Court of Smith County, Texas, in Cause Number 7-91-1086, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Aggravated Robbery and said conviction became final prior to the commission of the primary offense.

> AND THE GRAND JURORS AFORESAID, do further present, that prior to the commission of each offense set out above by the said MICHAEL WAYNE HALEY, to-wit: on the 18th day of October, 1991, in the 241st Judicial District of Smith County, Texas, in Cause Number 1-89-671, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Delivery of Amphetamine and said conviction became final prior to the commission of each of the offenses set out above.

According to Haley, the aggravated robbery in cause no. 7-91-1086 was committed on October 12, 1991, and the conviction in cause no. 1-89-671 did not become final until October 18, 1991. Thus, the indictment is incorrect in saying that the conviction in cause no. 1-89-671 became final "prior to the commission of each of the offenses set out above," and the jury incorrectly found the enhancement paragraphs to be true.

The Respondent sets the date for the commission of the aggravated robbery at October 15, 1991, rather than October 12, but concedes that Haley is correct in that the enhancement paragraph does not satisfy the provision in Texas law requiring that the second previous felony conviction be for an offense that occurred subsequent to the first previous conviction becoming final. Tex. Penal Code Ann. art. 12.42(a)(2). Nonetheless, the Respondent argues that Haley's sentence was improperly enhanced.

According to the Respondent's original answer, Haley's prior robbery conviction in cause no. 7-91-1086 carried a

finding that a deadly weapon was used in the commission of the offense. The Respondent states that Section 12.35 of the Texas Penal Code provides that a person convicted of a state jail felony shall be punished for a third degree felony if it is shown that the person had previously been finally convicted of any felony for which the judgment contains an affirmative finding of a deadly weapon. Additionally, the Respondent says, Haley had been previously convicted of the felony offense of delivery of a controlled substance, raising the level of punishment to that of a second-degree felony under Tex. Penal Code section 12.33. Haley received a sentence of 16 years and 6 months, falling within the range of a second degree felony; thus, the Respondent concludes that the punishment was properly enhanced.

Haley responds by saying that the sentence in cause no. 7-91-1086 did not contain a finding of a deadly weapon, indicating that this finding was removed by a *nunc pro tunc* judgment. The Respondent was ordered to answer this assertion and filed an answer essentially conceding that the finding of a deadly weapon had been removed, but arguing that Haley's claim on this point had been procedurally defaulted because he did not raise a timely objection to the enhancement provision.

Discussion and Analysis

The record shows that Haley was charged with the offense of theft of property valued at less than $1500.00, a Class A misdemeanor. This charge was enhanced by two prior theft convictions, occurring in 1989 and 1991, to a state jail felony.

According to the indictment, Haley also had previous convictions for robbery (cause no. 7-91-1086) and two cases for delivery of methamphetamine (cause no.'s 1-89-671 and 1-89-672). These offenses were used to enhance his offense to a second-degree felony, carrying a punishment range of two to 20 years in prison. Haley received a sentence of 16 years and six months, which was within this range.

Haley raises several challenges to the enhancement of his punishment. The first of these is that the robbery conviction did not become final prior to the commission of the other felony used for enhancement, the delivery of methamphetamine. The Respondent concedes that this is, in fact, correct, but argued in her initial answer that Haley's offense nonetheless was properly enhanced to a second-degree felony because the robbery involved the use of a deadly weapon. Haley argues, and the Director now concedes, that this finding was later removed, but the Director maintains that Haley's claim on this point is procedurally barred.

Under the Director's theory, Haley's present offense was enhanced to a state jail felony by this two prior convictions. It was then enhanced to a third degree felony by the robbery offense, and to a second degree felony by the offense of delivery of methamphetamine. The pertinent statutes, §§12.35 and 12.42 read as follows:

> §12.35 State Jail Felony Punishment
>
> (a) Except as provided by Subsection (c), an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail

for any term of not more than two years or less than 180 days.

(b) In addition to confinement, an individual adjudged guilty of a state jail felony may be punished by a fine not to exceed $10,000.

(c) An individual adjudged guilty of a state jail felony shall be punished for a third degree felony it if is shown on the trial of the offense that:

(1) a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited; or

(2) the individual has previously been finally convicted of any felony:

(A) listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure; or

(B) for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure.

§12.42 Penalties for Repeat and Habitual Felony Offenders

(a)(1) if it is shown on the trial of a state jail felony punishable under Section 12.35(a) that

the defendant has previously been finally convicted of two state jail felonies, on

conviction the defendant shall be punished for a third-degree felony.

(2) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony.

(3) If it is shown on the trial of a state jail felony punishable under Section 12.35(c) or on the trial of a third-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a second-degree felony.

(b) If it is shown on the trial of a second-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a first-degree felony.

(c) If it is shown on the trial of a first-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished by imprisonment in the institutional division of the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 15 years. In addition to imprisonment, an individual may be punished by a fine not to exceed $10,000.

(d)(1) If it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by imprisonment in the institutional division of the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years.

(subpart (D)(2) omitted)

Haley argues that the enhancement provisions are improper, because he was convicted of a state jail offense, but his prior offenses were not listed in Article 42.12, sec. 3(g), nor was there a finding that a deadly weapon was used in the commission of the offense; thus, he was convicted under Section 12.35(a), not 12.35(c). As stated above, although the indictment charged that he was convicted of two prior felonies, these being robbery and delivery of methamphetamine, the Respondent now concedes that the second was not committed before the first became final, and that the robbery conviction did not contain a finding of a deadly weapon so as to bring Haley under Section 12.35(c). Hence, Haley concludes, there is no basis for enhancement under Section 12.42, because he was convicted of a state jail felony under 12.35(a) with only *one* prior felony conviction.

This argument carries substantial force. The Respondent's answer thereto is that Haley is procedurally barred from challenging the enhancement provisions, because he did not do so at trial. The Respondent points to the decision of the Sixth Court of Appeals; however, the

discussion by that court of the error which occurred at trial focused on the fact that Haley was not given the opportunity to plead to the enhancement provisions at the beginning of the punishment phase, nor were the enhancement provisions read to the jury. Instead, the punishment phase opened with each side giving opening statements, and then the State put on evidence of Haley's prior convictions. Both sides rested and the jury was excused.

The trial judge then realized that the enhancement provisions had not been read to the jury and that Haley had not been given an opportunity to plead to them, so he brought the jury back in to reopen the punishment phase. Haley was given a chance to plead to the enhancements, but he declined to do so, requesting that the jury not be told that he had been given this opportunity. The jury was brought back in and the enhancement provisions were read, but no mention was made of either a plea by Haley or that he had been given the chance to do so. The State did not re-offer the evidence from the initial punishment phase and the defense did not stipulate to it, and Haley offered no objection to the reading of the enhancements or the failure to re-offer the evidence.

The Court of Appeals held that any error by the trial court in not requiring the previous evidence to be reintroduced, or by allowing the jury to consider the evidence presented before the reading of the enhancements, was waived by the failure to object. It is this holding upon which the Respondent bases her contention that Haley procedurally defaulted his claim.

As a general rule, federal review of a habeas corpus petition is procedurally barred if the last state court to consider

the claim expressly and unambiguously based its denial of relief on a state procedural default. Harris v. Reed, 489 U.S. 255 (1989). A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar. Harris, 489 U.S. at 263.

In this case, while the state court denied relief on Haley's challenge to the enhancements, this challenge was based on what happened during the punishment phase of the trial, not on Haley's complaint that the robbery charge did not include a finding of a deadly weapon. Thus, it is by no means clear that Haley's claim on this point can be procedurally barred, because there is no indication that the state court which considered this claim, which was raised in the state habeas corpus proceeding, "expressly relied" on the state procedural bar. Furthermore, Haley could hardly have been expected to raise this challenge at sentencing, because the State was not relying on the alleged deadly weapon finding as support for the enhancement; rather, it was relying on the two prior convictions, for robbery and delivery of methamphetamine, as support for the enhancement.

Even if a procedural bar existed, however, it seems clear that Haley can be excused from it. The Fifth Circuit has held that a procedural bar may be avoided by a showing that failure to consider the claims will result in a "fundamental miscarriage of justice." The showing of a fundamental miscarriage of justice may be demonstrated by a showing that the petitioner is actually innocent. Lucas v. Johnson, 132 F.3d 1069, 1077 (5th Cir. 1998). In the context of non-capital

sentencing, the Fifth Circuit has indicated, albeit in dicta, that in order to show "actual innocence" of a non-capital sentence, the petitioner must show but for the constitutional error, he would not have been legally eligible for the sentence which he received. Sones v. Hargett, 61 F.3d 410, 419 and n. 16 (5th Cir. 1995).

In this case, the record shows beyond doubt that Haley's conviction was improperly enhanced from a state jail felony to a second-degree felony. The State originally justified the enhancement by alleging that Haley had two prior felony convictions, but this did not comport with the statute in that the second was not committed before the first became final. The State then sought to justify the enhancement by pointing to a finding that a deadly weapon was used in the commission of a prior offense, but overlooked the fact that this finding had been removed by a *nunc pro tunc* judgment. The final argument advanced by the State is that, even though Haley had the finding of the deadly weapon removed by a *nunc pro tunc* judgment in 1993, and the State did not rely on the alleged deadly weapon finding to enhance the present offense, he is nonetheless barred from raising the fact that there was no deadly weapon finding because he did not raise this fact in the very proceeding in which the State did *not* rely on the finding. Such a holding would condemn Haley to suffer the consequences of an affirmative finding which, by virtue of the *nun pro tunc* judgment, never existed. This would be a classic example of a "fundamental miscarriage of justice."

Furthermore, it is apparent that Haley has shown that he is "actually innocent" of a sentence for a second-degree felony. *See* Sones, 61 F.3d at 419. Haley is entitled to relief

on his claim regarding the improper enhancement of his sentence.[1]

In his third ground for relief, Haley complains that the State made an improper jury argument by "leading the jury to believe" that he had been in prison twice, rather than just once. The Fifth Circuit has stated that in federal habeas actions, improper jury argument by the state does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's state court trial was rendered fundamentally unfair within the meaning of the Fourteenth Amendment's Due Process Clause. Felde v. Blackburn, 795 F.2d 400, 403 (5th Cir. 1986). To establish that a prosecutor's remarks are so inflammatory as to prejudice the substantial rights of a defendant, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in probability, but for the remarks no conviction would have occurred. Felde, 795 F.2d at 403, *citing* Kirkpatrick v. Blackburn, 777 F.2d 272, 281 (5th Cir. 1983).

The Supreme Court has stated that a prosecutor's remarks must be more than undesirable or even universally condemnable before reversal is warranted. Instead, the prosecutor's remarks must infect the trial with such unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 187 (1986); *see also* Bell v. Lynaugh, 828 F.2d 1085, 1095 (5th Cir.), *cert. denied* 484

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1. Because of the disposition of this claim, it is unnecessary to address Haley's claim that there was no evidence to support the charge that he had a prior conviction for robbery.

U.S. 933 (1987); Drew v. Collins, 964 F.2d 411, 417 (5th Cir. 1992).

In this case, the record shows that Haley was convicted of delivery of methamphetamine on October 18, 1991, receiving a sentence of 12 years in prison. He was then convicted on September 9, 1992, of attempted robbery, receiving a sentence of 10 years in prison. Thus, while it is not clear whether or not Haley went to prison on two different occasions, he was clearly convicted of prior felonies on two different occasions.

Haley has failed to show that the prosecutor's remarks infected his trial with such unfairness as to make his conviction or sentence a denial of due process. He unquestionably was a repeat offender, regardless of how many times he actually went to prison, and so the alleged prosecutor's remarks did not rise to he level of a constitutional deprivation. Haley's claim on this point is without merit.

Next, Haley complains that he received ineffective assistance from his attorney, Herbert Isham, identifying nine specific instances of such alleged ineffectiveness. The first five of these concern counsel's performance regarding the enhancements. Because relief is to be granted regarding the erroneous enhancement, the Court will not address Haley's claims concerning the performance of counsel on this points.

In his sixth claim of ineffective assistance, Haley contends that counsel did not object to the prosecutor's allegedly improper remarks about the number of times that he had been to prison. To prevail on a claim of ineffective assistance of counsel, a state prisoner seeking federal habeas

corpus relief must show that his attorney's performance was deficient and that the deficiency prejudiced him to the point that he was denied a fair trial. Strickland v. Washington 466 U.S. 668, 678 (1984). This means that the habeas petitioner must establish both that (1) counsel's performance was deficient in that it fell below an objective standard of reasonable competence and (2) the deficient performance so prejudiced the defense that the outcome of the trial was unreliable and there is a reasonable probability that, but for counsel's performance, the result of the trial would have been different. Unless a petitioner makes both showings, he is not entitled to relief. Lavernia v. Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988). The burden of proving ineffective counsel is on the petitioner. Hayes v. Maggio, 699 F.2d 198, 201 (5th Cir. 1983).

Here, Haley complains that Isham did not object to the prosecutor's argument by saying that Haley had only been to prison once, rather than twice. He has not shown that, had the jury known that he had two prior felony convictions but had only been to prison once, the result of the proceeding would probably have been different. Haley's claim on this point is without merit.

In his seventh point, Haley complains that his attorney did not file a motion for discovery. This is simply incorrect. Haley's attorney filed a motion for discovery of exculpatory evidence, a motion for the discovery of witnesses favorable to the defendant, a motion for production of witnesses' statements, and a motion for the production and inspection of evidence and information which may lead to evidence. *See*

Clerk's Record, pp. 11-22. Haley's claim on this point is without merit.

In his eighth point, Haley says that counsel "did not conduct an independent investigation" or interview the State's witnesses. He contends that had counsel conducted such an interview, he would have discovered that Haley "was never caught on videotape stealing anything," and that the videotape only shows him entering Wal-Mart once to return the calculator, not twice as alleged by the witnesses. He maintains that had counsel interviewed the witnesses, he would have known before trial that the witnesses were "putting the whole story together," and could have raised "serious doubts" about Haley ever being in the store prior to coming in and returning the calculator.

Adequate investigation is a requisite of effective assistance. Gray v. Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982). To establish a constitutional violation, however, a defendant must show both a failure to investigate adequately and prejudice arising from that failure. Gray, 677 F.2d at 1093. A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. U.S. v. Green, 882 F.2d 999, 1003 (5th cir. 1989).

Here, Haley offers nothing to show that a videotape even exists, much less that one shows what he says that it shows. Furthermore, the testimony at trial, from Lanier and from another associate named Fabian Arteaga, showed that they observed Haley pick up the calculator, leave the store from the back door, drive around to the front, and bring the

calculator into the store to try to get a refund or exchange. (Statement of Facts, vol. IV, pp. 38-48; vol. V, pp. 14-23). Haley offers nothing to show that, had Isham interviewed them prior to trial, either Lanier or Arteaga would have said anything different than the testimony which they presented at trial. Hence, his contention that a pre-trial interview would have demonstrated that Lanier and Arteaga were "putting the whole story together" and would have raised "serious doubts" about Haley's guilt is purely speculative and wholly fails to show prejudice arising from the alleged failure to investigate. Haley's claim on this point is without merit.

In his final, related point, Haley complains of counsel's failure to subpoena the "Wal-Mart videotape." However, as noted above, he fails to show that such a tape even exists. The Fifth Circuit has held that "[a]bsent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition (in state and federal court), unsupported and unsubstantiated by anything else contained in the record, to be of probative evidentiary value." Ross v. Estelle, 694 F.2d 1008, 1011-12 and n.2 (5th Cir. 1983); *see* Koch v. Puckett, 907 F.2d 524, 530 (5th Cir. 1990). Haley's suggestion that a "surveillance video" exists or that it would "prove his innocence" are nothing but bald assertions, unsupported by anything in the record, and thus has no probative value.

Additionally, as the Respondent points out, even if the video existed and did not show Haley stealing the calculator, this would not prove that he had not done so, but only that the video did not show him doing so. The testimony at trial demonstrated that he attempted to evade detection by furtively

placing the calculator in his pants and exiting the store by the back door, then driving around and entering the front of the store to seek a refund or exchange. Haley cannot prove a negative by arguing that the video did not overtly record his stealing the calculator and therefore he did not do so, even if the video existed. Haley's claim on this point is without merit.

Haley also says that when he asked counsel to subpoena the video, Isham told him that it was not necessary because the State had the burden of proof. Again, however, Haley fails to show that such a video tape even existed, much less that it was exculpatory. Had it existed and been exculpatory, a subpoena would have been unnecessary because Isham had already moved for disclosure of exculpatory evidence; had the tape existed and been inculpatory, Isham would not have been entitled to discover it. As the Respondent points out, however, there is no evidence and no testimony that a surveillance video existed at all. Haley's claim on this point is without merit.

RECOMMENDATION

It is accordingly recommended that the Petitioner's application for the writ of habeas corpus be granted as to the claim that his sentence was improperly enhanced. It is further recommended that the Texas courts should be given ninety (90) days in which to re-sentence Haley without the improper enhancement of his sentence. It is further recommended that the Petitioner's conviction be reversed if the Texas courts fail to re-sentence him within ninety days. Finally, it is recommended that the remaining claims raised by Haley in this petition be denied.

A party's failure to file objections to the findings, conclusions, and recommendations contained in this Report within ten days after service with a copy thereof shall bar that party from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court.

Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 13th day of September, 2001.

/s/ Judith K. Guthrie
Judith K. Guthrie
United States Magistrate Judge